87-750

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PAN AMERICAN WORLD AIRWAYS, INC.,
Petitioner,

v.

ERNESTO SERIO PAMPIN LOPEZ, Individually and as Administrator of the Estate of his Deceased Mother, SARA E. LOPEZ DE PAMPIN, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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November 6, 1987

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QUESTIONS PRESENTED

1. Whether a defendant who is jointly and severally liable for a foreign plaintiff's losses is precluded, as a matter of law, from invoking the discretionary principles of *forum non conveniens* whenever a co-defendant, such as the United States, is unable or unwilling to appear in any foreign court that could serve as the "alternative forum" for trying damages claims.

2. Whether the limitations on liability established by the Warsaw Convention and the Montreal Agreement are extinguished pursuant to the terms of Article 3(2) of the Convention or the Montreal Agreement if the advice of limited liability that is printed on the passenger's ticket appears in 9-point rather than 10-point type.*

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* In addition to the parties listed in the caption, the United States, Luis Alberto Trivelloni-Lorenzi and Susana Electra Trivelloni-Lorenzi were parties to proceedings in the Court of Appeals.

The companies and organizations Pan American World Airways, Inc. ("Pan Am") is required to list in compliance with Rule 28.1 of the Rules of this Court are the following: Aeronautical Radio, Inc., Air Cargo, Inc., Airline Tariff Publishing Company, Escola Americana de Rio de Janeiro, Honolulu Fueling Facilities Corporation, International Aeradio (Caribbean) Ltd., Liberian Development Corporation, Manhattan Air Terminal, Inc., Nigerian Aviation Handling Co., Pan Am Corporation, Promotora de Hoteles de Turismo Medellin, S.A., Radio Aeronautica Paraguaya, S.A., Social Immobiliaria Norteamericana, S.A., Societe de Tourisme et Representation, and Societe International de Telecommunications Aeronautiques.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Pan American World Airways, Inc., respectfully requests that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in these cases.

OPINIONS BELOW

The *en banc* opinion of the court of appeals (App. 1a) is reported at 821 F.2d 1147 (1987). The opinion of the panel of the court of appeals (App. 81a) is reported at 789 F.2d 1092 (1986). The district court's order granting partial summary judgment for plaintiffs (App. 102a) is not reported. The district court's order deny-

ing Pan Am's motion to dismiss on the grounds of *forum non conveniens* is reflected as a "minute entry" on the court's docket sheet and is not reported.

JURISDICTION

The judgments of the court of appeals upon rehearing *en banc* were entered on July 21, 1987. App. 103a and 105a. On October 12, 1987, Justice White extended the time for filing this petition for a writ of certiorari to and including November 6, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

TREATIES AND AGREEMENTS INVOLVED

The Warsaw Convention,[1] a treaty ratified by the United States, is reproduced in part at App. 107a-110a. The Montreal Agreement,[2] a private agreement signed by various air carriers, is reproduced at App. 111a-114a.

STATEMENT OF THE CASE

1. *Proceedings in the District Court.* On July 9, 1982, Pan American World Airways, Inc. ("Pan Am") Flight 759 crashed at Kenner, Louisiana, killing all 145 people on board. Approximately 56 of the victims were foreign nationals.

Relying on diversity jurisdiction, 28 U.S.C. § 1332, foreign nationals filed approximately 52 actions in various United States District Courts to recover for the

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), note following 49 U.S.C. app. § 1502; App. 107a. (Hereinafter referred to as the "Warsaw Convention.")

[2] Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Agreement CAB 18900 approved by CAB Order E-23680, May 13, 1966, Docket 17235, 31 Fed. Reg. 7302 (1966), note following 49 U.S.C. app. § 1502; App. 111a. (Hereinafter referred to as the "Montreal Agreement.")

deaths of at least 42 of the approximately 56 foreign decedents who were aboard the flight.[3] These initial complaints generally named as defendants Pan Am, the municipal board that operated the airport, and manufacturers of the aircraft.[4]

After the foreign and domestic cases were consolidated for discovery and related pretrial proceedings in the United States District Court for the Eastern District of Louisiana, Pan Am moved to dismiss the suits relating to all foreign decedents on the ground of *forum non conveniens*. In this connection, it proposed that the dismissal of these suits should be conditioned on various undertakings by Pan Am including: (1) Pan Am would forgo contesting its liability for the accident; (2) Pan Am would waive the limits or ceilings placed on damages of air carriers covered by the Warsaw Convention and the Montreal Agreement; (3) Pan Am would submit to the jurisdiction of (and appear in) the courts of each foreign plaintiff's domicile; and (4) Pan Am would fully satisfy any judgment by the foreign court that was rendered against it.[5] App. 5a.

At the time this motion was made, the United States was not a party defendant because the plaintiffs had not yet exhausted the administrative procedures of the Federal Tort Claims Act, 28 U.S.C. §§ 2671-72, 2675; but it

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[3] In addition, approximately 39 suits were filed by American nationals against Pan Am and others in federal courts for the wrongful death of approximately 44 victims who were nationals or residents of the United States.

[4] Among the defendants sued were United States Aviation Underwriters, Inc., the New Orleans Aviation Board, and the manufacturers, including the Boeing Company, United Technologies Corp., and the Pratt-Whitney Aircraft group. Eventually all defendants except Pan Am and the United States were dismissed from the various cases. App. 6a.

[5] Pan Am's insurers guaranteed the payment of any judgment rendered against Pan Am. App. 48a-50a.

was clear that many plaintiffs would sue the United States because of the role that its air traffic controllers had played in the crash. Because the United States cannot appear in foreign courts,[6] the United States' status as a nascent party defendant in the district court posed the issue whether, as a prerequisite to invocation of the doctrine of *forum non conveniens*, all defendants must be amenable to process in the foreign court that is proposed as the alternative forum.

In its motion, Pan Am advised the District Court that the conditions of dismissal that the carrier proposed were calculated to make the United States a superfluous defendant because Pan Am would not contest liability, would waive the various treaty limits on the amount of damages it would pay,[7] and would fully satisfy any judgment by a foreign court. App. 5a & 41a.

The District Court denied Pan Am's motion without comment. Before the motion was filed, however, the trial judge had said that he would deny any forthcoming motion because the United States is a party and the crash occurred in New Orleans. App. 4a-5a. Pan Am attempted to present the *forum non conveniens* issue to the appellate court before trial of any foreign case by moving for interlocutory review pursuant to 28 U.S.C. § 1292(b), which was denied, by petitioning the Court of Appeals for a writ of mandamus, which was denied, and by re-

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[6] In the Federal Tort Claims Act, Congress permitted tort suits against the Government, but in doing so, it gave "exclusive jurisdiction" over such suits to the United States District Courts. 28 U.S.C. § 1346(b).

[7] Unlike the liability of air carriers, the United States' liability is not limited by the Warsaw Convention or the Montreal Agreement. See Part II, *infra*. Thus, Pan Am's proposed waiver of these limits would have expanded its own liability to match, or exceed, the extent of the potential liability of the United States.

questing consideration *en banc*, which was also denied. App. 5a.

As the overall litigation proceeded, various plaintiffs either tried their damages claims or settled those claims.[8] The respondents to the instant petition—Ernesto Pampin Lopez and Luis and Susana Trivelloni-Lorenzi—were the first foreign plaintiffs to try damages claims arising from this crash. In advance of their trials, the district court ruled that Pan Am could not invoke the Warsaw Convention and Montreal Agreement, both of which applied to these passengers, to limit its liability to $75,000 per decedent. This ruling rested on the fact that the tickets issued to the passengers provided notice of the limitation in 9-point type, rather than 10-point type. App. 6a-7a.

When these two cases were tried, commencing on August 27, 1984, Pan Am and the United States limited their defense to cross-examination of plaintiffs and their witnesses. Defendants claimed that they were unable to call witnesses and adduce documentary evidence relating to plaintiffs' damages because of their inability to take discovery in Uruguay, the domicile of plaintiffs and their decedents. At the conclusion of the trial, the jury awarded the Lopez family $516,853.89 and the Trivelloni family, $203,530.00. Pan Am and the United States appealed. App. 7a.

2. *Relevant Rulings of the Panel and the En Banc Court.* On appeal, Pan Am contended, *inter alia*, that the District Court should have granted its motion to dismiss on the ground of *forum non conveniens*, and, alternatively, that the District Court should not have lifted the ceiling on liability if the international cases were to be tried in the United States. A panel of the Fifth Circuit affirmed both rulings of the District Court, and the Fifth

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[8] Pan Am did not contest its liability for the accident in any of the cases and thus all cases arising from this crash to date have been limited to issues of damages.

Circuit *en banc* separately reviewed the *forum non conveniens* ruling.

a. *The Ceiling on Damages in International Carriage.* In deciding whether the usual ceiling on an air carrier's liability for international carriage should apply to the New Orleans disaster, the court looked to the Second Circuit's decision in *In re Air Crash Disaster at Warsaw, Poland,* ("*LOT*") 705 F.2d 85, *cert. denied,* 464 U.S. 845 (1983). App. 7a n.8 & 91a. In *LOT*, the Second Circuit held that an air carrier must issue a passenger ticket that provides adequate notice of the ceiling placed on its liability by the Warsaw Convention and the Montreal Agreement. The court further held that any notice given in type smaller than 10-point type is *per se* inadequate.

In the instant case, the panel "accept[ed] and adopt[ed]" the reasoning of the Second Circuit and ruled that Pan Am could not invoke the limit on liability because the tickets—which were issued by an Argentine airline—provided notice in 9-point type rather than 10-point type. App. 91a. The *en banc* court cited *LOT* and reinstated this portion of the panel's decision. App. 7a n.8 & 46a.

b. *Forum Non Conveniens.* The court of appeals, sitting *en banc*, held that there was no occasion for the district court to weigh the convenience of trying plaintiffs' damage claims in decedents' homeland (Uruguay) or to weigh the public interest factors bearing on the location of such a trial. No balancing of conveniences was permitted, in the court's view, because Pan Am had failed to meet the threshold requirement for invoking the doctrine of *forum non conveniens*: namely, Pan Am failed to demonstrate that Uruguay was an "available and adequate foreign forum" for the trial of the Uruguayan plaintiffs' claims. App. 34a, 42a. See *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 506-07 (1947), and *Piper*

Aircraft Co. v. *Reyno*, 454 U.S. 235, 254 n.22 (1981). In the Court's view, Uruguay failed to qualify as an adequate available forum because one of the defendants, the United States, could not appear in that forum. App. 42a.

The *en banc* court's ruling rests on the proposition that the "alternative forum" requirement, established in *Gilbert and Reyno*, cannot be met unless *all* defendants will appear in the proposed alternative forum. The *en banc* court announced this rule at least five times.[9]

REASONS FOR GRANTING THE WRIT

I. The Court Should Review The Fifth Circuit's Decision Because It Establishes An Important And Inflexible Prerequisite To The Invocation Of The Doctrine Of *Forum Non Conveniens*, It Significantly Reduces The Utility Of That Doctrine In Litigation Arising From Class And Mass Disasters, And It Conflicts With A Decision Of The Sixth Circuit.

The court of appeals has added significantly to the threshold requirements that must be met in order to invoke the doctrine of *forum non conveniens* and correspondingly has reduced the occasions when district courts may exercise their discretion in accordance with the principles of *forum non conveniens*. The threshold requirement, as developed by the court of appeals, prevents invocation of the doctrine of *forum non conveniens* in all cases where the plaintiff names the United States as a

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[9] The *en banc* court said: (1) "[T]he doctrine of *forum non conveniens* presupposes the existence of at least two forums in which *all* defendants are amenable to process." (App. 31a; emphasis added); (2) "the moving defendant must establish that an adequate and available forum exists as to *all* defendants if there are several." (App. 33a; emphasis added); (3) "[a] foreign forum is available when the entire case and *all* parties can come within the jurisdiction of that forum." (App. 34a; emphasis added); (4) this case was properly tried in the United States "because no other forum could entertain the plaintiffs' actions against *all* of the defendants." (App. 40a; emphasis added); and (5) Pan Am's proposed conditions for dismissal "simply fail to make *all* defendants available to plaintiffs in a Uruguayan forum." (App. 42a.)

co-defendant or adds a private co-defendant who cannot or will not appear abroad. The restrictive effects of this ruling, moreover, are likely to be greatest in those types of litigation that heavily burden our courts—mass disaster litigation arising from a single incident such as an air crash, and class disaster litigation arising from various exposures to products or substances that may have harmful effects. This Court should review the decision below in order to determine whether the Fifth Circuit's threshold requirement is an appropriate extension of *Gilbert* and *Reyno* and in order to resolve the conflict that presently exists between the Fifth and the Sixth Circuits.

Neither *Gilbert* nor *Reyno* confronted the problem presented here—whether the doctrine of *forum non conveniens* may be invoked when one of the co-defendants who are jointly and severally liable cannot appear in a foreign forum that is otherwise wholly suitable and convenient for trying the plaintiff's damages claims. In *Reyno*, the Court said the "central focus" of the doctrine of *forum non conveniens* inquiry is "convenience," and the guiding principle of the doctrine is "flexibility." 454 U.S. at 249-50. If the Fifth Circuit had concluded that the doctrine of *forum non conveniens* might be invoked by a private defendant in cases where the United States is also a defendant, a trial court would weigh, *inter alia*, the effect of the absence of one defendant on the issues that might be tried in a foreign forum. The Fifth Circuit, however, believed that the weighing process was foreclosed by statements in *Gilbert* and *Reyno*: "In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process," *Gilbert*, 330 U.S. at 506-07; and "[o]rdinarily, this requirement will be satisfied when the defendant is 'amenable to process' in the other jurisdiction." *Reyno*, 454 U.S. at 254 n.22. Thus, the court below concluded that plaintiffs' homeland

was not an adequate alternative forum solely because the United States was not prepared to appear in the Uruguayan courts.[10]

The *en banc* ruling, we suggest, is not compelled by *Gilbert*, which involved a single defendant, or by *Reyno*, where both defendants agreed to appear in Scotland; and the ruling is not consonant with the usual understanding of adequate forums.[11] But most important, in expanding the scope of the threshold requirements established in *Gilbert*, the Fifth Circuit has correspondingly reduced the occasions when the principles or criteria of *forum non conveniens* may be considered by federal courts.

The Fifth Circuit's ruling will deprive private defendants of the protections of *forum non conveniens* whenever the plaintiff adds the United States as a co-defendant. This is an important limitation because the United States has broad exposure to tort liability—especially in the field of aviation--so long as it is sued in a United States

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[10] In contrast, courts have not treated the amenability of potential third-party defendants to suit abroad as a *per se* or threshold matter, but rather as a circumstance to be weighed in determining the relative conveniences and inconveniences of trial abroad. *Reyno*, 454 U.S. at 259; *Pain* v. *United Technologies Corp.*, 637 F.2d 775, 790-91 (D.C. Cir. 1980); *Fitzgerald* v. *Texaco, Inc.*, 521 F.2d 448, 453 (2d Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976); *De Melo* v. *Lederle Laboratories*, 801 F.2d 1058, 1063 (8th Cir. 1986). One might reasonably conclude that it is no more important for the plaintiff to have all defendants present in a single forum than it is for a defendant to have all third-party defendants present in a single forum.

[11] Federal and state courts routinely adjudicate a plaintiff's claims even though some of the tortfeasors who are jointly and severally liable are not before the court. Ordinarily, since a plaintiff can obtain full relief from either of two tortfeasors, neither one is indispensable to the litigation, and the litigation can proceed against one or more of them. *E.g.*, Restatement (Second) of Torts § 882 at 328 (1977); Fed. R. Civ. P. Rules 19 and 21.

District Court.[12] The federal rules of civil procedure provide for liberal joinder of defendants, including the United States; prevailing tort law generally recognizes that two or more parties may be held responsible for a wrorgful death or personal injury; and the Congress has waived sovereign immunity for tortious conduct by the United States, but that waiver only extends to suits brought in the United States District Courts.[13] See 28 U.S.C. § 1346; the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2674, 2679-80 (general tort liability); and Suits in Admiralty Act, 46 U.S.C. app. §§ 741, 742 (Supp. III 1985) (liability for damages involving vessels and cargo).[14]

Similarly, the Fifth Circuit's ruling will deprive defendants of the protection of *forum non conveniens* when-

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[12] For example, for fiscal years 1981-1985, nearly 1,000 complaints were filed in federal district courts against the United States arising from 179 different aircraft accidents, with claims exceeding $25 billion. In addition, during the same period, 1,690 administrative claims were filed with the Federal Aviation Administration seeking more than $43 billion. In 1985, the United States paid over $33 million to settle pending litigation or to satisfy adverse judgments, and the FAA paid a total of $6,691,000 to settle $105 million in claims. Dilk, *Aviation Tort Litigation Against the United States—Judicial Inroads on the Pilot-in-Command Concept*, 52 J. Air. L. & Com. 797, 862 (1987).

[13] The Fifth Circuit erroneously concluded (App. 42a n.37) that the United States consented to appear abroad in *Friends For All Children* v. *Lockheed Aircraft Corporation*, 717 F.2d 602, 604 (D.C. Cir. 1983). The decision does not support that reading and the record in the case shows that (a) only Lockheed had agreed to appear in foreign courts; (b) plaintiffs had not sued the United States; it was simply a third-party defendant that had been sued by Lockheed; and (c) the United States had already agreed to a formula for indemnifying Lockheed.

[14] For other statutes creating liability for the United States, see Public Vessels Act, 46 U.S.C. app. §§ 781-782 (liability for damage caused by a public vessel); and 42 U.S.C. §§ 2211, 2212 (liability for radiation from nuclear powered vessels and nuclear testing).

ever a plaintiff adds a private defendant who cannot or will not appear abroad. In many cases there may be sound reasons why one or more private defendants cannot or will not appear abroad. For example, an American manufacturing corporation probably will not agree to appear in the courts of Iran to defend a products liability claim arising from an air crash in the Middle East.[15] Likewise, present and past employees of a corporate defendant—*e.g.*, the pilot of an airline, the director of testing for a pharmaceutical company, or an engineer formerly employed by Union Carbide—may ostensibly share joint and several liability with their corporate employer for countless injuries and loss of life, but the individuals may reasonably decline to defend in a foreign court since their resources are so limited that they are effectively judgment proof in any forum.[16]

Restrictions on the invocation of the doctrine of *forum non conveniens* also serve to deprive district courts of an important tool for managing air disaster litigation and other mass and class disasters involving international

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[15] See *In re Air Crash Disaster at Riyadh Airport, Saudi Arabia*, 540 F. Supp. 1141 (D.D.C. 1982). Plaintiffs brought suit in the District of Columbia. They were residents mainly of Iran, Saudi Arabia and Pakistan (*id.* at 1149 n.19), who were flying to Mecca in an airplane that was operated by defendant Saudi Arabian Airlines, maintained by defendant Trans World Airways, and manufactured by defendant Lockheed Aircraft Corporation. The order of dismissal provided that only one of the three defendants would be required to appear in any given foreign forum provided that the single defendant would pay all of plaintiffs' damages awarded by that forum.

[16] Compare *Watson* v. *Merrell Dow Pharmaceuticals, Inc.*, 769 F.2d 354 (6th Cir. 1985) (suit in Ohio against two individual employees of corporate defendant as well as against corporate defendant); *Moorhead* v. *Mitsubishi Aircraft International, Inc.*, 639 F. Supp. 385 (E.D. Tex. 1986), *aff'd in part, rev'd in part*, 828 F.2d 278 (5th Cir. 1987) (suit against pilot's estate, United States, and Mitsubishi).

commerce. In such cases, the plaintiffs' liability claims generally present common issues of law and fact, but their damages claims generally present highly discrete issues of fact that are specific to each plaintiff. Thus, discovery and trial of liability issues may be done conveniently in a single forum, whereas discovery and trial of damages issues may be done more conveniently in other forums. Relying on the doctrine of *forum non conveniens*, district court judges frequently remit foreign plaintiffs to their homelands or to another forum for trial of their damages claims when the issue of liability has been removed from the litigation by stipulation or by a determination of liability in the district court.[17] In such instances, the doctrine of *forum non conveniens* is the international analogue of 28 U.S.C. § 1407, which permits the

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[17] *Bouvy-Loggers* v. *Pan American World Airways, Inc.*, 15 Av. Cas. (CCH) 17,153, 17,154 (S.D.N.Y. 1978) (dismissal after liability issues stipulated); *Gilchrist* v. *Trans Canada Air Lines*, 27 A.D.2d 524, 275 N.Y.S.2d 394, 395 (1966) (liability would be stipulated if case were sent to Canada; dismissal granted although two defendants would not go); *Chhawchharia* v. *The Boeing Co.*, 657 F. Supp. 1157 (S.D.N.Y. 1987) (liability issues stipulated); *In re Disaster at Riyadh Airport, Saudi Arabia*, 540 F. Supp. 1141, 1147, 1155 (D.D.C. 1982) (same); *Jennings* v. *The Boeing Co.*, 660 F. Supp. 796 (E.D. Pa. 1987), amended June 23, 1987 (order available on WESTLAW and in Avi. Lit. Rep. (Andrews) 7320 (July 13, 1987)) (same); *Myers* v. *The Boeing Co.*, No. 86-2-14507-9 (Wash. Super. Ct. Sept. 10, 1987) (reprinted in Avi. Lit. Rep. (Andrews) 7621 (Sept. 28, 1987)) (initially court retained liability phase, but after liability was stipulated, the court dismissed the damages phase). Occasionally, the federal courts may remit plaintiffs to the courts of another country for the trial of both the liability and damages issues. *E.g.*, *Reyno*, *supra* (dismissal for trial in United Kingdom).

Dismissals may be conditioned on defendants' agreement, *inter alia*, to appear, waive the statute of limitations, and produce witnesses or documents. See the above cases and *Pain* v. *United Technologies Corp.*, 637 F.2d at 795; *In re Union Carbide Corp. Gas Plant Disaster*, 809 F.2d 195 (2nd Cir. 1987), *cert. denied*, 108 S. Ct. 199 (1987) (dismissal for trial in India).

federal judiciary to manage complex multi-district litigation within the United States.[18]

Finally, the Fifth Circuit's ruling is flatly inconsistent with the Sixth Circuit's decision in *Watson* v. *Merrell Dow Pharmaceuticals, Inc.*, 769 F.2d 354 (6th Cir. 1985). In that litigation, the foreign plaintiffs sued the pharmaceutical company, Merrell, for products liability and added two of its employees as defendants—a supervisor of testing and a medical director. When the pharmaceutical company moved to dismiss the foreign plaintiffs' claims, it was not clear that the proposed foreign court would have jurisdiction over the individual defendants, and the individuals had not consented to appear in a foreign court. *Id.* at 356-57. The district court granted the company's motion to dismiss as to all defendants because Merrell was the " 'primary defendant,' " and the plaintiffs would not be deprived " 'of a meaningful opportunity to pursue their claims' " even without the individual defendants appearing abroad. 769 F.2d at 357. The Sixth Circuit affirmed the dismissal of Merrell. Thus, in contrast to the instant decision, the Sixth Circuit holds that the doctrine of *forum non conveniens* may be invoked even if some of the defendants are not amenable to the jurisdiction of the foreign court.

The Sixth Circuit's decision, however, has its own problem. The court of appeals determined that the claims against the individuals should not be dismissed. Instead,

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[18] See *In re Air Crash Disaster at Tenerife, Canary Islands on March 27, 1977*, 461 F. Supp. 671 (J.P.M.L. 1978) (remanding cases to transferee courts after defendants stipulated liability); *In re Air Crash Disaster at Pago Pago, American Samoa, on Jan. 30, 1974*, 394 F. Supp. 799, 800 (J.P.M.L. 1975) (denying transfer with respect to an action in which the defendant airline stipulated to liability); *In re Richardson-Merrell, Inc.*, 606 F. Supp. 715 (J.P.M.L. 1985) (remanding plaintiffs not participating in consolidated liability trial to their courts of origin after verdict for defendant in the consolidated trial).

the court remanded the actions against the individual defendants to the district court for trial. The Sixth Circuit also criticized the district court for considering whether the individuals were "primary" defendants and whether plaintiffs would be deprived of a meaningful opportunity to pursue their claims if the individuals did not appear abroad. Thus, the court of appeals said that the district court had engaged in "impermissible intermingling of the threshold criteria with the subsequent balancing test." [19]

In sum, review by this Court is warranted. The Fifth Circuit's decision conflicts with the Sixth Circuit's ruling in *Merrell*, and establishes an inflexible prerequisite that curtails the power of district courts to remit parties to the most convenient forum when, for example, the plaintiffs name the United States or an impecunious individual as a co-defendant. The lower court's ruling, moreover, will have its greatest and most unfortunate effects in class and mass disaster litigation where district courts need broad and flexible authority to manage the cases before them.

II. The Court Should Review The Fifth Circuit's Decision Because It Adopts A Construction Of The Warsaw Convention That Has Been Rejected By The District Of Columbia Circuit And The Supreme Court Of Canada.

The decision below also should be reviewed in order to place a uniform reading on Article 3(2) of the Warsaw Convention and related provisions of the Montreal Agree-

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[19] There is no reported decision as to the steps taken on remand. It was open to the individual defendants to agree to appear and defend in Scotland, to submit to trial in the district court, or to move for a stay of their trials pending disposition of the more convenient trial in the United Kingdom. See, *e.g.*, Restatement (Second) of Conflict of Laws § 86 comment b at 259 (1969) (where an action is pending in a foreign jurisdiction and it is clear that plaintiff can secure all the relief he is entitled to there, a United States court can grant a stay of the second action pending the outcome of the action abroad).

ment.[20] Under Article 3, the air carrier must deliver to the passenger a ticket advising the passenger of the limitation. App. 108a. Pursuant to the Montreal Agreement, a private agreement reached among air carriers in 1966, the advice on the ticket is to be printed in 10-point type. App. 112a.

Foreign carriers regularly issue tickets containing the requisite advice about the limit on liability, but those tickets often fail to provide such advice in 10-point type.[21] United States as well as foreign courts are thus repeatedly confronted with the question whether the limitation on a carrier's liability is extinguished because the message on the passenger's ticket is printed in less than 10-point type.

In resolving this question, the courts of appeals have reached conflicting results based on conflicting constructions of Article 3(2) of the Warsaw Convention:

> "The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not

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[20] The Warsaw Convention limits a carrier's liability for death or injury of a passenger to $8,300. The Montreal Agreement raises the limit to $75,000.

[21] See *Lisi* v. *Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d 508 (2d Cir. 1966), *aff'd by an equally divided court*, 390 U.S. 455 (1968); *In re Air Crash Disaster at Warsaw, Poland*, 705 F.2d 85 (2d Cir.), *cert. denied*, 464 U.S. 845 (1983) (*LOT*); *In re: Korean Air Lines Disaster of September 1, 1983*, No. 85-5982, Slip op. at 11 (D.C. Cir. Sept. 25, 1987) (*"KAL"*); *In re Air Crash Disaster Near New Orleans*, App. 91a and 102a (tickets issued by Aerolineas Argentinas); *Ludecke* v. *Canadian Pacific Airlines Ltd.*, 98 D.L.R. 3d 52, 15 Av. Cas. (CCH) 17,687 (Can. 1979); *Milliken Trust Co.* v. *Iberia Lineas Aereas de Espagna, S.A.*, 11 Av. Cas. (CCH) 17,331 (N.Y. Sup. Ct. 1969), *aff'd without opinion*, 36 A.D.2d 582, 317 N.Y.S.2d 734 (1971); *Eck* v. *United Arab Airlines, Inc.*, 12 Av. Cas. (CCH) 18,427 (N.Y. Sup. Ct. 1974).

be entitled to avail himself of those provisions of this convention which exclude or limit his liability." App. 109a.

A divided panel of the Second Circuit held in *Lisi* that placing a "Lilliputian" and illegible statement of limited liability on the passenger's ticket is tantamount to failing to "deliver" a ticket as required by Article 3 of the Convention.[22] *Lisi* v. *Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d 508, 514 (2d Cir. 1966) (Kaufman and Lumbard, J.J., with Moore, J., dissenting). Since no ticket had been "delivered," within the Second Circuit's meaning of that term, the limitation on the carrier's liability was extinguished. This Court granted certiorari to review *Lisi*, but ultimately affirmed without opinion because the Court was equally divided. 390 U.S. 455 (1968).

In *LOT*, the Second Circuit revisited the issue in light of the Montreal Agreement, which took effect in 1966. The Second Circuit held that "although [the Montreal Agreement] is actually a private agreement among carriers, it effectively modifies the Convention." 705 F.2d at 88. The statement required under Article 3(1)(e) of the Convention, as "effectively modifie[d]" must be in 10-point type. *Id.* at 89. Thus, in *LOT* the limit on the carrier's liability was extinguished because 8.5-point type was used. 705 F.2d at 86 & 91.

In the instant case, the Fifth Circuit, without substantive discussion, adopted the Second Circuit's ruling in *LOT*. The Fifth Circuit held that petitioner Pan Am could not invoke the limitation on its liability because the tickets, which were issued by Aerolineas Argentinas, were printed in 9-point type. App. 7a n.8, 46a & 91a.

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[22] The court relied on prior cases holding that poorly timed delivery (*e.g.*, after the passenger was on board or while boarding) was not proper delivery under Article 3(2). *Mertens* v. *Flying Tiger Line, Inc.*, 341 F.2d 851, 856 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965); *Warren* v. *Flying Tiger Line, Inc.*, 352 F.2d 494, 498 (9th Cir. 1965).

The decisions of the Second and Fifth Circuits fail to address the meaning of the first sentence of Article 3(2), which provides that "The absence, *irregularity*, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention." (Emphasis added.) Relying on that sentence, the United States Court of Appeals for the District of Columbia Circuit [23] has held that the limitation on the carrier's liability is not extinguished when the statement on the ticket is printed in type smaller than 10-point. *In re: Korean Air Lines Disaster of September 1, 1983*, No. 85-5982, Slip op. at 2, 4 (D.C. Cir. Sept. 25, 1987) ("KAL").[24]

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[23] The District of Columbia Circuit "adopt[ed] as our opinion the comprehensive July 25, 1985 Memorandum of the District Court" (slip op. at 4). The adopted decision of the district court is appended to the *KAL* slip opinion and is printed at 19 Av. Cas. (CCH) 17,584 (1985).

[24] The District of Columbia Circuit also traversed the Second Circuit's conclusion that the Montreal Agreement "effectively modifies" the Warsaw Convention, making it require 10-point type. In this regard, the District of Columbia Circuit said that the Montreal Agreement simply "*supplemented* the Article 3 requirements that a statement be included in the passenger ticket by providing specifics to be provided by carriers stopping in the United States . . . ." *KAL* slip op. app. at 27. (Emphasis added.) Under the Warsaw Convention, "it has been generally understood that in exchange for virtual strict liability against air carriers, international passengers are limited in their recovery." *Id.* at 26. Although the Montreal Agreement raised the liability limitation under Article 22 (App. 109a) and waived the air carrier's defenses under Article 20 (*Id.*), "it did not alter the *quid pro quo* by linking Articles 22 and 20 with Article 3." *Id.* at 27. Moreover, because the signatories to the Agreement were the air carriers and not the contracting parties to the Warsaw Convention, the District of Columbia Circuit held that they were incapable of altering or amending the Convention, which they apparently had not wanted to do in any event. *KAL* slip op. app. at 27-28.

The District of Columbia Circuit was persuaded by a decision of the Canadian Supreme Court which rejects the so-called "American" rule. In *Ludecke* v. *Canadian Pacific Airlines Ltd.*, 98 D.L.R. 3d 52, 15 Av. Cas. (CCH) 17,687 (Can. 1979), the Supreme Court of Canada held, *inter alia*, that under the Warsaw Convention:

> "the words of Article 3(2) are plain and can admit of no misunderstanding. The absence, irregularity, or loss of a passenger ticket will not affect the existence or the validity of the contract of carriage. The benefit of the limitation will be lost only where no ticket is delivered. The American cases referred to above which hold that delivery of a ticket with an irregularity, that is, a statement as required by Article [3]1(e) which is illegible, amounts to no delivery of a ticket, ignore this plain language and fail to give effect to a precise statement of the law." 15 Av. Cas. (CCH) at 17,690.[25]

Thus, as matters stand there is an intra-national and international split in authority interpreting Article 3(2) of the Warsaw Convention and the Montreal Agreement. The decision below and the decisions of the Second Circuit have been rejected by the Supreme Court of Canada and the District of Columbia Circuit because they ignore the first sentence in Article 3(2) and, in Judge Moore's words, amount to "judicial treaty-making." *Lisi*, 370 F.2d at 515; see also *KAL* slip op. app. at 28.

As a matter of United States law, the split among the circuits is worthy of review because there is a special need to ensure uniformity of law in air disaster cases. Air disasters usually produce damages suits in various federal circuits, and it is most unfortunate if not un-

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[25] See G. Miller, *Liability in International Air Transport* 87-88 (1977) (discussing French case predating *Ludecke* and taking the position, also taken in *Ludecke*, that under the Warsaw Convention, providing notice is not a prerequisite to obtaining the liability limitation).

acceptable when plaintiffs and defendants who are involved in the same accident or similar accidents are treated vastly different because two courts of appeals place different readings on a single treaty provision. Such considerations led the District of Columbia Circuit to state: "the proper interpretation of the Convention and Agreement . . . [is a] matter[] in need of definitive resolution for our national court system." *KAL* slip op. at 11.

The international split in authority adds to the need for review. When lower courts of the United States construe an international treaty in a manner that is squarely rejected by respected tribunals in other nations, the interest in fostering and preserving a uniform body of international law depends on this Court. One explicit purpose of this multilateral treaty is to regulate in "a uniform manner the conditions of international transportation by air in respect of the documents used for such transportation and of the liability of the carrier. . . ." App. 107a. That purpose remains unsatisfied so long as the courts of appeals disagree among themselves and disagree with the Supreme Court of Canada as to the outcome of the issue presented here.[26]

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[26] In petitioner's view, each of the issues presented here is worthy of review. If *certiorari* were denied on the *forum non conveniens* issue, the Warsaw issue would remain as a freestanding issue. If *certiorari* is granted on the *forum non conveniens* issue and the decision below is affirmed, or if the decision is reversed but the lower courts determine that the case was properly tried here, the Warsaw issue remains unaffected. If the Court grants *certiorari* on the *forum non conveniens* issue and reverses, and if the cases are ultimately dismissed to a foreign forum, Pan Am has agreed to waive the Warsaw liability limitation and the issue would then drop from the case. At that time and in those circumstances, the Warsaw Convention issue would be moot in the instant cases (although not in numerous others arising from this accident). The possibility of future mootness does not deprive the Court of the opportunity to resolve what is now a live con-

CONCLUSION

A writ of certiorari should be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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troversy, however. *United States* v. *Sharpe*, 470 U.S. 675, 681-82 n.2, 105 S.Ct. 1568, 1573 n.2 (1985) ("had we thought that we should decline to reach every constitutional issue that might become moot, we would have denied certiorari."); *Washington* v. *Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 692-93 n.32 (1979).